

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD FOUNDATION
1333 H St. NW
Washington, DC 20005,

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION
400 Maryland Ave. SW
Washington, DC 20202,

Defendant.

Case No. 17-cv-2609

COMPLAINT

1. Plaintiff Democracy Forward Foundation brings this action against Defendant the United States Department of Education to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA”), and alleges as follows:

JURISDICTION AND VENUE

2. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(b) and 28 U.S.C. § 1391(e)(1).

PARTIES

4. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part by educating the public on government actions and policies.

5. Defendant the United States Department of Education (the “Department”) is a federal agency within the meaning of the FOIA, *see* 5 U.S.C. § 552(f)(1), that is headquartered in Washington, D.C. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

6. In November 2016, the Department promulgated final regulations “to protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by, institutions participating in the Department’s student aid programs.” *See* 81 Fed. Reg. 75,926, 75,926 (Nov. 1, 2016) (the “Borrower Defense Regulations”). Recognizing that, when postsecondary institutions partake in such practices, “student loan borrowers may be eligible for discharge of their Federal loans,” the Borrower Defense Regulations

give students access to consistent, clear, fair, and transparent processes to seek debt relief; protect taxpayers by requiring that financially risky institutions are prepared to take responsibility for losses to the government for discharges of and repayments for Federal student loans; provide due process for students and institutions; and warn students in advertising and promotional materials . . . about proprietary schools at which the typical student experiences poor loan repayment outcomes . . . so that students can make more informed enrollment and financing decisions.

Id.

7. By their terms, the Borrower Defense Regulations were to become effective on July 1, 2017. *See id.*

8. On May 24, 2017, the California Association of Private Postsecondary Schools (“CAPPS”) filed suit to challenge certain aspects of the Borrower Defense Regulations. *See* Compl., *Cal. Ass’n of Private Postsecondary Sch. v. DeVos* (“CAPPS”), No. 17-cv-999 (D.D.C.

May 24, 2017), ECF No. 1. CAPPS moved for a preliminary injunction just over a week later, on June 2, 2017. *CAPPS*, ECF No. 6.

9. On June 14, 2017, citing the *CAPPS* lawsuit and the provision of the Administrative Procedure Act that permits an agency, under certain circumstances, to “postpone the effective date of action taken by it[] pending judicial review,” 5 U.S.C. § 705, the Department postponed certain provisions of the Borrower Defense Regulations, *see* 82 Fed. Reg. 27,621 (June 16, 2017) (the “Delay Rule”).¹

10. That same day, CAPPS withdrew its motion for preliminary injunction. *CAPPS*, ECF No. 21.

11. On June 16, 2017, Plaintiff submitted a FOIA request to the Department, via email, seeking the following:

1. Any and all records that refer or relate to [CAPPS], including, but not limited to, communications sent to or from any individuals at CAPPS (including names of CAPPS-affiliated individuals listed herein).
2. All communications, including any attachments, sent to or from the following individuals: Boris Bershteyn, Gregory Bailey, Robert Shapiro, Clifford Sloan, Caroline Van Zile.
3. All communications, including any attachments, sent to or from any individuals from Bridgepoint Education, Inc., including, but not limited to, Andrew Clark, Chris Henn, Marc Brown, Kevin Royal, Anurag Malik, Diane Thompson, Vickie Shray, Tom McCarty, Robert Hartman, Patrick Hackett, Dale Crandall, Ryan Craig, and Victor K. Nichols.
4. All communications, including any attachments, sent to or from Anthony Campau of the Office of Management and Budget.

¹ Although the Delay Rule was published in the Federal Register on June 16, 2017, it “was placed on public inspection on June 14, 2017.” Defs.’ Mot. for Summ. J. at 9, *Massachusetts v. Dep’t of Educ.*, No. 17-cv-1331 (D.D.C. Dec. 1, 2017), ECF No. 56.

Ex. A (FOIA request) at 1-2; *see also id.* at 5 (listing “individuals affiliated with CAPPS for the purposes of Request No. 1”). Plaintiff limited its request to four offices at the Department (the offices of the Secretary, of the Deputy Secretary, of the Undersecretary, and of Postsecondary Education), and to the time period from January 20, 2017, to the date the search is conducted. *See id.* at 2.

12. On June 19, 2017, Plaintiff received an email from the Department acknowledging receipt of Plaintiff’s FOIA request and assigning it tracking number 17-02001. *See Ex. B* (acknowledgment letter).

13. As of the date of this Complaint, the Department has failed to: (i) notify Plaintiff whether the Department will comply with Plaintiff’s FOIA request, *see* 5 U.S.C. § 552(a)(6)(A)(i); (ii) assert whether the Department believes that “unusual circumstances” justify its delay, *see id.* § 552(a)(6)(B); or (iii) produce the requested records or demonstrate that they are lawfully exempt from production, *see id.* § 552(a)(6)(C). Nor has the Department notified Plaintiff of the scope of any responsive records the Department intends to produce or withhold and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

14. Because the Department has “fail[ed] to comply with the applicable time limit provisions” of the FOIA, Plaintiff is “deemed to have exhausted [its] administrative remedies.” *See id.* § 552(a)(6)(C)(i),

CLAIM FOR RELIEF

Count One (Violation of the FOIA, 5 U.S.C. § 552)

15. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

16. By failing to respond to Plaintiff's request within the statutorily prescribed time limit, Defendant has violated its duties under the FOIA, including but not limited to its duties to conduct a reasonable search for responsive records, and to produce all responsive, reasonably segregable, non-exempt information.

17. Plaintiff is being irreparably harmed by Defendant's violation of the FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;
2. order Defendant to produce, by a date certain, any and all nonexempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
4. grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
5. grant Plaintiff such other relief as the Court deems just and proper.

Dated: December 7, 2017

Respectfully submitted,

/s/ Javier M. Guzman
Javier M. Guzman (D.C. Bar No. 462679)
Adam Grogg (N.Y. Bar)*
Democracy Forward Foundation

1333 H. Street NW
Washington, DC 20005
(202) 448-9090
jguzman@democracyforward.org
agrogg@democracyforward.org

*Admitted in New York; practicing under the supervision of members of the D.C. Bar while D.C. Bar application is pending.

Counsel for Plaintiff

Exhibit A



**DEMOCRACY
FORWARD
FOUNDATION**

P.O. Box 34553
Washington, DC 20043
202-448-9090
foia@democracyforward.org

June 16, 2017

VIA EMAIL

Gregory Smith
Director, FOIA Service Center, Office of Management
Department of Education
LBJ 2E320
400 Maryland Avenue, SW
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Freedom of Information Act Records Request

Dear Mr. Smith:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and the Department of Education FOIA regulations at 34 C.F.R. Part 5, Democracy Forward Foundation makes the following request for records.

On June 14, 2017, the Department announced a partial delay of the effective date of certain regulations concerning student financial assistance, arguing that “justice so require[d]” the Department to do so due to pending litigation in the case *California Association of Private Postsecondary Schools v. DeVos*, No. 1:17-cv-00999 (D.D.C. May 24, 2017). As a number of senators noted last week, the rule in question “creates a straightforward and transparent process for defrauded students to apply for relief to which they are entitled under federal law,” and implementing the rule “without delay is practicable, necessary, and very clearly in the public interest.” *See* Letter from Sens. Elizabeth Warren, Patty Murray, Sherrod Brown, and Richard Durbin to Secretary Betsy DeVos (June 8, 2017). Absent the lawsuit noted above, relevant statutes would have “prohibit[ed] the Department from unilaterally amending or delaying a final rule” as the Department did on June 14.

Democracy Forward Foundation requests that the Department of Education produce the following within twenty (20) business days:

1. Any and all records that refer or relate to the California Association of Private Postsecondary Schools (or “CAPPS”), including, but not limited to, communications sent to or from any individuals at CAPPS (including names of CAPPS-affiliated individuals

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listed herein).

2. All communications, including any attachments, sent to or from the following individuals: Boris Bershteyn, Gregory Bailey, Robert Shapiro, Clifford Sloan, Caroline Van Zile.
3. All communications, including any attachments, sent to or from any individuals from Bridgepoint Education, Inc., including, but not limited to, Andrew Clark, Chris Henn, Marc Brown, Kevin Royal, Anurag Malik, Diane Thompson, Vickie Shray, Tom McCarty, Robert Hartman, Patrick Hackett, Dale Crandall, Ryan Craig, and Victor K. Nichols.
4. All communications, including any attachments, sent to or from Anthony Campau of the Office of Management and Budget.

Please limit this search to the following offices at the Department of Education: Office of the Secretary, Office of the Deputy Secretary, Office of the Undersecretary, Office of Postsecondary Education.

The time period for this request is January 20, 2017, to the date the search is conducted.

Please search for records regardless of format, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical materials. This request includes, without limitation, all correspondence, letters, emails, text messages, calendar entries, facsimiles, telephone messages, voice mail messages, and transcripts, notes, minutes, or audio or video recordings of any meetings, telephone conversations, or discussions.

FOIA requires agencies to disclose information, with only limited exceptions for information that would harm an interest protected by a specific exemption or where disclosure is prohibited by law. 5 U.S.C. §552(a)(8)(A). In the event that any of the requested documents cannot be disclosed in their entirety, we request that you release any material that can be reasonably segregated. *See* 5 U.S.C. § 552(b). Should any documents or portions of documents be withheld, we further request that you state with specificity the description of the document to be withheld and the legal and factual grounds for withholding any documents or portions thereof in an index as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document include both disclosable and non-disclosable material that cannot reasonably be segregated, we request that you describe what proportion of the information in a document is non-disclosable and how that information is dispersed throughout the document. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

If requested records are located in, or originated in, another agency, department, office,

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installation or bureau, please refer this request or any relevant portion of this request to the appropriate entity.

To the extent that the records are readily reproducible in an electronic format, we would prefer to receive the records in that format. However, if certain records are not available in that format, we are willing to accept the best available copy of each such record.

Please respond to this request in writing within 20 working days as required under 5 U.S.C. § 552(a)(6)(A)(i). If all of the requested documents are not available within that time period, we request that you provide us with all requested documents or portions of documents that are available within that time period. If all relevant records are not produced within that time period, we are entitled to a waiver of fees for searching and duplicating records under 5 U.S.C. § 552(a)(4)(A)(viii)(I).

Democracy Forward Foundation is requesting that the Department expedite its processing of the Requests above, because students with potential claims under the final borrower defense regulations face an imminent loss of substantial due process rights. Any delay in the implementation of the final rule deprives the students of their rights to file claims for forgiveness of fraudulent debts. Further, any delay increases the ultimate tax burden on these students, whose forgiven debts will be subject to taxation on the basis of an amount that continues to accrue interest each day that their claims are not fulfilled. As such, the Department should expedite the processing of the requests above, which will allow potential claimants to more fully understand and, if necessary, challenge the Department's basis for delaying implementation of the final rule.

Democracy Forward Foundation is a nonprofit organization organized under Internal Revenue Code § 501(c)(3) and dedicated to educating the public about the operation of the federal government. The records we obtain from this request will be used to support those public education efforts, and we intend to disseminate publicly an analysis of those records. As a nonprofit organization, we do not have a commercial interest in the records. We therefore request a waiver of fees for searching and duplicating records in response to this request under the exception at 5 U.S.C. § 552(a)(4)(A)(iii), which requires waiver of fees if the disclosure is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." If our request for a waiver is denied, we are willing to pay all reasonable fees incurred for searching and duplicating records in responding to this request, up to \$250. If the costs of responding to this request should exceed that amount, please contact us before incurring costs exceeding that amount.

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles to releasing fully the requested records within the 20 day period, please contact

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Karianne Jones as soon as possible at foia@democracyforward.org or (202) 448-9090.

We appreciate your assistance and look forward to your prompt response.

Sincerely,

/s/ Karianne Jones

Karianne Jones
Democracy Forward Foundation

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List of individuals affiliated with CAPPS for the purposes of Request No. 1

In addition to any individuals employed by CAPPS, the following individuals are associated with CAPPS and should be included in any search for the purposes of fulfilling Request No. 1:

- Yasith Weerasuriya, Stanbridge College
- Matthew Johnston, Santa Barbara Business College
- Mike Abril, San Joaquin Valley College
- Fardad Fateri, International Education Corporation
- Lisa Fuerst, Success Education Colleges
- Konstantine Gourji, Gurnick Academy of Medical Arts
- Lynelle Lynch, Bellus Academy
- Valerie Mendelsohn, American Career College
- Sally Mikhail Bemis, Mikhail Education Corporation
- Rick Wood, Select Education Group
- Michael Zimmerman, MTI College
- Keith Zakarin, Duane Morris LLP
- Katherine (Kate) Lee Carey, Cooley LLP
- Lisa Fuerst, Success Education Colleges
- Matthew Johnston, Santa Barbara Business College
- Lisa Olmedo, Enrollment Resources
- David Vice, Asher College

Exhibit B



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

Office of the Chief Privacy Officer

June 19, 2017

Karianne Jones
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043

RE: FOIA Request No. 17-02001-F

Dear: Karianne Jones

This is in response to your letter dated June 16, 2017, requesting information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on June 19, 2017, and forwarded to the primary responsible office(s) for action.

You requested: Any and all records that refer or relate to the California Association of Private Postsecondary Schools (or "CAPPS"), including, but not limited to, communications sent to or from any individuals at CAPPS (including names of CAPPS-affiliated individuals listed herein). "SEE REQUEST FOR DETAILS"

Please refer to the FOIA tracking number to check the status of your FOIA request at the link provided below:

<http://www2.ed.gov/policy/gen/leg/foia/foiatoc.html>

#

Any future correspondence or questions regarding your request, please contact the FOIA Public Liaison at 202-401-8365 or EDFOIAManager@ed.gov#

Sincerely,

ED FOIA Manager